Similarly, the *Section 706 NPRM* proposes at several points to adopt exceptions to its requirement that the incumbent not discriminate against the affiliate in order to permit transfers to the affiliate.[48] These proposals show the incompatibility of the Commission's separate affiliate concept and the pro-competitive goals of the Act. Incumbents should be required to offer to all CLECs on a nondiscriminatory basis any equipment available for transfer.

The Commission should not permit carriers to transfer facilities that have been ordered, but not installed. This could permit carriers to order equipment now and later transfer the equipment. If the Commission allows any transfers, the Commission should only permit transfers of equipment installed as of a date well before release of the *Section 706 NPRM*. The Commission should also limit any transfers to a period immediately after establishment of the affiliate as a legally separate entity.

Another example of bestowing a substantial advantage on the affiliate is the proposal to let the affiliate retain "transferred" equipment in place. The *Section 706 NPRM* tentatively concluded that to the extent that space limitations exist at the central office the affiliate would not be allowed to keep the equipment in place.[49] This would not be sufficient to protect independent carriers but would bestow on the affiliate the advantage of having been first in the central office, which would be entirely attributable to the fact that the incumbent placed the equipment there before it was "transferred" to the affiliate. The Commission should require that the incumbent publish its intent to transfer the equipment to the affiliate and leave it in place and afford independent carriers the

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48 *Section 706 NRPM* at para. 111.

49 *Section 706 NPRM* at para. 110.

opportunity to request that they be able to place equivalent equipment in the central office. If there is insufficient space for all requesters, then the affiliate should be required to remove the equipment.

Further, the possibility raised by the Commission that safeguards would sunset would seriously disadvantage competitors. As long as the incumbent enjoys market power, it will have the incentive and ability to favor its affiliate and discriminate against competitors. Thus, safeguards should continue in effect until such time as the incumbent is declared non-dominant. Any earlier abandonment of safeguards, would simply allow incumbents to thwart competition in provision of advanced services by favoring affiliates.[50] In this connection, and for the same reason, Allegiance urges the Commission to continue stringent safeguards in effect for BOC provision of long distance service under its other authority under the Act past the sunset date of Section 272 safeguards.

As a practical matter, Allegiance does not believe that it will be possible for an incumbent LEC to establish a separate owned and controlled affiliate subject to the type of safeguards envisioned by the Commission without irremediably favoring the affiliate to the detriment of competition. If the Commission determines to allow incumbent LECs to establish advanced services affiliates, the Commission should only permit the incumbent to provide a small amount of start up capital to an affiliate, subject to the requirement that it then transfer ownership of the affiliate directly to its stockholders in the same way that AT&T recently broke itself into three separate corporations. The new company could then seek to raise additional funding and acquire needed personnel and facilities in the same way as other CLECs.

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[50] The Commission's suggestion that affiliates of small incumbents would be subject to a reduced set of safeguards would confer great advantages on affiliates of those entities and could essentially foreclose the advantages of competition being provided to customers of those LECs. *Section 706 NPRM* at para 98.

D. Prior Approval of Separate Affiliates

If the Commission adopts some variation of its separate affiliate proposal, the Commission should establish a thorough preapproval process for the affiliate. The Commission should require the incumbent to submit a complete plan for establishing the affiliate including proposed asset transfers, marketing plans, and a capitalization plan, with an opportunity for public comment.[51] This approach is the minimum necessary to provide any degree of assurance that the incumbent's separate affiliate proposal will not undermine the pro-competitive goals of the 1996 Act.

E. Preemption of State Regulation

Telecommunications facilities are used for both interstate and intrastate communications. Thus, it would not be possible, as a practical matter, for an affiliate to receive a transfer of facilities for intrastate communications without also authorizing a transfer for interstate communications. Given this inseverability, it is clear that the Commission has authority to preempt state regulation

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[51] In its *Computer II* regulatory regime the Commission established prior approval procedures for provision of enhanced services by separate affiliates of AT&T and GTE. *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, 77 FCC 2d 384, ¶ 260 (1980) (*Computer II Final Decision*), *recon.*, 84 FCC 2d 50 (1980) (*Reconsideration Order*), *further recon.*, 88 FCC 2d 512 (1981) (*Further Reconsideration Order*), *affirmed sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983). *See also In the Matter of American Information Technologies Corp., BellSouth, NYNEX; Interim Capitalization Plans for the Furnishing of Customer Premises Equipment and Enhanced Services (Centrex Sales Agent Order)*, 98 F.C.C.2d 943 (1984).

that would be incompatible with its separate affiliate scheme,[52] and has established similar preemptions previously.[53]

However, the *Section 706 NPRM* does not consider the need for, or propose, preemption of state regulation of any advanced services affiliate. Instead, the Commission merely urged states to exercise their authority over any incumbent LEC affiliate's provision of intrastate advanced services in a way consistent with the Commission's policy for advanced services affiliates.[54]

Allegiance understands the sensitivity of preemption issues and that the Commission is reluctant to preempt state authority. However, the Commission's reluctance in this instance to preempt state authority renders its separate affiliate scheme unworkable. The Commission cannot rationally adopt a scheme of safeguards and claim that they would be effective while leaving open a gaping hole for states to essentially eviscerate them. Thus, absent preemption, a state could authorize transfers of loops to the affiliate for provision of intrastate advanced services notwithstanding that the Commission may have prohibited transfers of loops for provision of interstate advanced services. More specifically, the Commission should preempt any state safeguards applicable to an incumbent's advanced services affiliate that are more lenient than federal safeguards. The

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[52] *See* Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, n. 4 (1986). *See also* Maryland Public Service Comm'n v. FCC, 909 F.2d 1510 (D.C. Cir. 1990); California v. FCC, 905 F.2d 1217 (9th Cir. 1217); Texas Public Utility Comm'n v. FCC, 886 F.2d 1325, 1331 (D.C. Cir. 1989); National Association of Regulatory Commissioners v. FCC, 880 F.2d 422, 429 (D.C. Cir. 1989); North Carolina Utilities Comm'n v. FCC, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); North Carolina Utilities Comm'n v. FCC, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

[53] In *Computer III* the Commission established preemptions of some state structural separation requirements. *See* n. 45, *supra.*

[54] *Section 706 NPRM* at 116.

Commission must either preempt to that extent state authority over any incumbent advanced services affiliate or abandon its separate affiliate proposal.

VII. LIMITED INTERLATA RELIEF

In Section 271, Congress essentially made statutory the restrictions on BOC provision of interLATA services under the AT&T Consent Decree. Indeed, the term "LATA" is derived from the AT&T Consent Decree. Thus, the Commission's authority to grant LATA boundary changes should be measured by reference to the parameters of waivers granted under the AT&T Consent Decree. Under the AT&T Consent Decree, the District Court approved modification of LATA boundaries to facilitate provision of local telephone service between nearby exchanges where the competitive effects were minimal and a sufficient community of interest across LATA boundaries was shown.[55] The District Court also approved LATA modifications for independent telephone companies seeking to upgrade their networks in a manner that would require routing traffic through a BOC switch in a different LATA.[56]

Similarly, the Commission has exercised its authority under Section 3(25) to approve changes to LATA boundaries to permit expanded local calling service between communities that lie on different sides of existing LATA boundaries.[57] and to permit independent telephone companies

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[55] *Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations*, 12 FCC Rcd 10646, paras. 7, 8 (1997)(summarizing District Court decisions).

[56] *Petitions for LATA Association Changes by Independent Telephone Companies*, 12 FCC Rcd 11769, ¶ 5 (1997) (summarizing District Court decisions).

[57] *Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service at Various Locations*, CC Docket No. 96-159, Memorandum Opinion and Order, 12 FCC Rcd 10646 (1997.

to route traffic through a BOC LATA other than the one with which they are currently associated.[58]

However, granting interLATA relief to allow access to a node on the Internet backbone would far exceed any of the waivers granted by the District Court under the AT&T Consent Decree or by the Commission under Section 3(23). Such relief would go far beyond the refinement of particular geographical boundaries the District Court granted to recognize particular communities of interest. Essentially, it would permit BOCs to provide interLATA service that Section 271 proscribes until such time as they have complied with the requirements of that Section. Accordingly, the Commission may not move LATA boundaries for the purpose of authorizing BOCs to provide interLATA service to an Internet node.

Moreover, this action is not necessary to provide high speed access to any regions of the country. At such time as there is sufficient market demand for provision of high speed connections to the network, interexchange carriers will do so. To the extent BOCs are willing to provide such service where is would not be economically justified to do so, Allegiance believes that they would only do so through improper cross-subsidies from other services.

VIII. CONCLUSION

Allegiance supports the Commission's proposals to establish more rigorous collocation and unbundling requirements. Those proposals are the best way in this proceeding for the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." Allegiance respectfully requests the Commission not to adopt its

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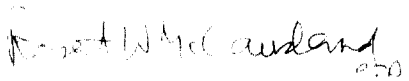
[58] *Petitions for LATA Association Changes by Independent Telephone Companies*, CC Docket No. 96-158, Memorandum Opinion and Order, 12 FCC Rcd 10529 (1997).

proposal to permit incumbent LECs to provide advanced services through an unregulated separate affiliate. Congress intended for the Commission to fully enforce and implement the key market opening provisions of the 1996 Act, not to create ways for incumbent LECs to evade those provisions.

Respectfully submitted,



Robert W. McCausland
Vice President, Regulatory and Interconnection
Allegiance Telecom, Inc.
1950 Stemmons Freeway
Suite 3026
Dallas, TX 75207-3118
(214) 261-7117 or 1-800-750-1833 (Tel)
(214) 261-7110 (Fax)

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CERTIFICATE OF SERVICE

I, Ivonne Diaz, hereby certify that on this 25th day of September 1998, copies of the foregoing Comments of Allegiance Telecom, Inc. was hand delivered to the parties listed below.

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Janice M. Myles (1 + disk)
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 539-A
Washington, D.C. 20554

International Transcription Service
1231 20th Street, N.W.
Washington, D.C. 20554

Chairman William E. Kennard
Chairman
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

John Nakahata
Chief of Staff
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

Thomas Power
Legal Advisor
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

Susan Ness
Commissioner
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

James L. Casserly
Senior Legal Advisor
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

Harold Furchtgott-Roth
Commissioner
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

Kevin J. Martin
Legal Advisor
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

Michael K. Powell
Commissioner Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

Kyle D. Dixon
Legal Advisor
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

Goria Tristani
Commissioner
Federal Communications Commission
1919 M Street, N.W.
Room 826
Washington, D.C. 20554

Paul Gallant
Legal Advisor
Federal Communications Commission
1919 M Street, N.W.
Room 826
Washington, D.C. 20554

Kathryn Brown
Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 500
Washington, D.C. 20554

Larry Strickling
Federal Communications Commission
1919 M Street, N.W.
Room 500
Washington, D.C. 20554

Carol Mattey
Chief, Policy Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 544
Washington, D.C. 20554

Jordan Goldstein
Policy Division
Common Carrier Bureau Federal
Communications Commission
1919 M Street, N.W.
Room 544
Washington, D.C. 20554

Ivonne Diaz